Supreme Court, U.S.
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No.--

IN THE

Supreme Court of the United States

October Term, 1985

VINCENT DI NAPOLI,

Petitioner,

against

NORTHEAST REGIONAL PAROLE COMMISSION, UNITED STATES PAROLE COMMISSION, DENNIS LUTHER, as Warden of the Federal Correction Institution, Danbury, Connecticut, and WILLIAM FRENCH SMITH, as Attorney General of the United States of America,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Question Presented.

Did the Parole Commission violate the Federal Constitution's prohibition against ex post facto laws (U.S. Const. Article I, §9 Acl. 3) by applying 1983 Guidelines, rather than 1979 Guidelines which were in effect at the time of petitioner's offense, plea bargain and sentencing, where the result of such application of 1983 Guidelines was to give to petitioner a later parole date than he would have received under the 1979 Guidelines?

Parties.

The caption of the case contains the names of all parties.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985.

VINCENT DI NAPOLI,

Petitioner,

vs.

NORTHEAST REGIONAL PAROLE COMMISSION, UNITED STATES PAROLE COMMISSION, DENNIS LUTHER, as Warden of the Federal Correction Insitution, Danbury, Connecticut, and WILLIAM FRENCH SMITH, as Attorney General of the United States of America,

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PETITION FOR WRIT OF CERTIORARI

Opinion Below.

A copy of the opinion of the United States Court of Appeals for the Second Circuit, decided June 13, 1985 and reported at 764 F.2d 143, is annexed hereto as an appendix.

Jurisdiction.

(a) The judgment denying the petition for a writ of habeas corpus was made on January 25, 1985. The judgment of affirmance of the United States Court of Appeals for the Second Circuit was made on June 13, 1985.

(b) There was no request and no order with respect to a rehearing.

(c) Jurisdiction to review the judgment in question by certiorari is conferred by 28 USC §1254(1).

Constitutional and Statutory Provisions Involved.

Constitutional Provision

U.S. Constitution, Article I, §9, cl. 3

"No Bill of Attainder or ex post facto Law shall be passed."

Statutory Provision

18 U.S.C. §4201, subdiv. (a) and (b)

"Powers and duties of the Commission

(a) The Commission shall meet at least quarterly, and by majority vote shall—

(1) promulgate rules and regulations establishing guidelines for powers enumerated in subsection (b) of this section and such other rules and regulations as are necessary to carry out a national parole policy and the purposes of this chapter;

(2) create such regions as are necessary to carry out the provisions of this chapter, but in no event less than five; and

(3) ratify, revise, or deny ad request for regular, supplemental or deficiency appropriations, prior to the submission of the requests to the Office of Management and Budget by the Chairman, which requests shall be separate from those of any other agency of the Department of Justice.

(b) The Commission, by majority vote, and pursuant to the procedures set out in this chapter, shall have the power to—

(1) grant or deny an application or recommendation to parole any eligible prisoner;

(2) impose reasonable conditions on an order granting parole;

(3) modify or revoke an order paroling any eligible prisoner; and

(4) request probation officers and other individuals, organizations, and public or private agencies to perform such duties with respect to any parolee as the Commission deems necessary for maintaining proper supervision of an assistance to such parolees; and so as to assure that no probation officers, individuals, organizations, or agencies shall bear excessive caseloads."

Statement of the Case.

Petitioner is in custody in the Federal Correctional Institution at Danbury, Connecticut where he is serving a

five year term of imprisonment. He began his sentence by surrendering on March 2, 1983.

The sentence followed a plea bargain which was made on April 16, 1982 (2a).* Petitioner had been indicted in a 15 count indictment in the District Court of the Eastern District of New York. Count 2 of the indictment was under the Racketeer Influenced and Corrupt Organization Act (RICO), 18 USC §1962(c), and alleged that more than $100,000 was involved (54a).

A trial of the indictment was held, and it resulted in a mistrial.

Rather than try the case again, the United States Attorney and petitioner's attorneys, acting for and with petitioner, entered into an agreement as follows:

1. Petitioner would plead guilty to Count 2;

2. A sentence of incarceration would not exceed five years plus a fine; and

3. In communications to the Parole Commission there would be no claim that the amount with which petitioner was involved exceeded $33,000, which petitioner agreed to return.

There was no formal writing executed by the parties, but the agreement was memorialized in the minutes of proceedings before Judge George C. Pratt (now of the Court of Appeals, Second Circuit) (8a). Accordingly, petitioner did withdraw his earlier entered plea of Not Guilty and

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*Unless otherwise indicated, the numbers in parentheses refer to pages in the Petitioner's Appendix in the Court of Appeals for the Second Circuit.

Pled Guilty on April 16, 1982 to Count 2 of the indictment as part of the following contract, stated by his counsel to be:

> "Mr. DiNapoli voluntarily said, proposed, authorized to offer that he will return the $33,000 which was involved, to the Government and that the Government in turn is not going to claim in their communications to the parole Commission as to the part which deals with the amount involved and it will not claim an amount in excess of $33,000, which Mr. DiNapoli has voluntarily agreed to return.

He was sentenced on July 19, 1982, to confinement for a period of five years and to pay a $25,000 fine. Because of illness, he did not begin serving his sentence until March 2, 1983.

New Guidelines were adopted by the Parole Commission in January, 1983, between the date of petitioner's sentence and the time of commencement of his imprisonment.

The respondents determined that petitioner's salient factor score was six. The Guidelines, which existed prior to January, 1983 had been adopted in 1979 and were in effect at the time of the offense, the plea and the sentencing, would have placed the offense in a category no higher than Category 4. That category combined with his salient factor score would provide an indicated time of imprisonment of from twenty to twenty-six months.

The former Guidelines had no special category for RICO offenses. The January, 1983, Guidelines provided for the first time that crimes under the RICO statutes were in Category 5. With his salient factor score, the new

Guidelines set forth an indicated time of imprisonment of thirty-six to forty-eight months.

The Court of Appeals found (764 F.2d at p.146):

> "And for the purpose of the petition, despite the government's claim to the contrary, we accept appellant's contentions that had the 1979 Guidelines been applied, and had the Commission not considered the $100,000 offense, he would have received an earlier indicated parole date."

Petitioner did receive a later parole date because the Parole Commission applied the 1983 Guidelines and ignored the plea bargain. He received his initial parole hearing before an examining panel of the Parole Commission on August 28, 1983.

The Parole Commission held in a Notice of Action dated September 20, 1983 that under its existing regulations (1983 Guidelines), the offense was in Category 5 which, when combined with his salient factor score of 6, indicated a range of imprisonment of thirty-six to forty-eight months, more than sixteen months longer than the 1979 Guidelines would have indicated.

Petitioner took the appropriate appeal and the National Appeals Board of the Parole Commission affirmed the earlier decision in a Notice of Action on Appeal dated March 22, 1984. It approved the application of the 1983 Guidelines and said (57a):

> "The Commission has maintained the position that the guidelines in effect at the time of the initial hearing are to be utilized . . .
>
> Your offense severity rating has been correctly rated as Category Five because, as you state, you

> were convicted under the RICO statute, 18 USC, Section 1962. However prior to the adoption of the current guidelines, your offense still would have been rated as at least Category Five because it involved receipt or attempted receipt of monies for labor peace exceeding $100,000."

Petitioner has contended that he withdrew his plea of Not Guilty and waived his rights to a jury trial, to confront his accusers, to present witnesses and to be convicted by proof beyond a reasonable doubt on the inducement that no claim would ever be made that more than $33,000 was involved. In the light of the earlier mistrial, the waiver and plea had significance to the prosecution.

Petitioner also contended that the application of the 1983 Guidelines was a violation of the Constitution's prohibition against *ex post facto* laws.

Chief Judge Daly of the Connecticut District Court denied the petition for a writ of habeas corpus "(f)or the reasons stated in the government's response" (30a), which claimed that the Guidelines were not laws and that the plea agreement did not say what petitioner claimed.

The Court of Appeals, however did not reach the plea agreement. It held that the Guidelines were not "laws" within the meaning of the *ex post facto* clause. Accordingly, it found no need to reach the question of the plea agreement. It held the category in which the 1983 Guidelines placed the RICO offense would have been the same Category Five had the Commission never learned of the involvement of $100,000. It found that the claim of breach of the plea agreement was "to no avail" (764 F.2d at p. 147).

Reasons For Granting the Writ.

The Court of Appeals for the Second Circuit rendered its decision in this case in conflict with the decision of the Court of Appeals for the Third Circuit in *United States ex rel. Forman v. McCall,* 709 F.2d 852 (1983). The decision in the case at bar seems also to be in conflict with the decision of this Court in *Weaver v. Graham,* 450 U.S. 24, 101 S. Ct. 960, 67 L.Ed.2d 17 (1981).

While *Weaver* dealt with an act passed by a legislature, the principles there enunciated should govern the case. The decision in this case and the reliance by the Second Circuit Court of Appeals on its own earlier decisions have created such a conflict that the matter should be settled by this Court.

The application to persons in custody of amendments to parole guidelines is beyond the episodic and academic. The resolution of the problem raised in the case at bar, where the amendments post-date the offense and the sentence, will have immediate importance far beyond the particular facts and the prisoner involved. Petitioner claims that the Guidelines had a negative effect upon a substantive right and are in fact laws which are subject to the *ex post facto* clause.

The Earlier Decisions Of The Second Circuit Court of Appeals Are Inapposite.

The Court of Appeals indicated that the decision in this case was based upon its earlier decisions in *Priore v. Nelson,* 626 F.2d 211 (1980) and *Shepard v. Taylor,* 556 F.2d 648 (1977). Neither of the cases stands for the proposition for which they were cited, and neither supports the decision below that the application of new guideline amendments does not violate the *ex post facto* clause.

Shepard, the earliest of the two cases, actually supports the petitioner. The petitioner in that case had been sentenced in 1972 pursuant to the Federal Youth Corrections Act, 18 U.S.C. §5010. Under that act, a person under the age of twenty-two would receive "treatment and supervision," and he was entitled to release at any time he was deemed prepared to reintegrate into society.

The "severity" of the offender's crime was not one of the factors that could be weighed in determining whether to release him. Chief Judge Kaufman who wrote the opinion for *Shepard* cited the language of the Chief Justice in *Dorszynski v. United States,* 418 U.S. 424, 434, 94 S.Ct. 3042, 3048, 41 L.Ed.2d 855 (1974), to support his finding that offense severity was not a factor, quoting:

> "(an) important element of the program was that once a person was committed for treatment under the Act, the execution of the sentence was to fit the person, not the crime for which he was convicted."

Shepard was paroled and committed a second crime for which he was convicted in 1974 and confined in New York State. Guidelines were adopted for the first time in 1976 and they required that the 1974 conviction be considered of the "greatest severity." Chief Judge Kaufman found (556 F.2d at p. 654):

> "The inescapable conclusion is that the Commission's consideration of offense severity pursuant to the 1976 Amendments operated retroactively to Shepard's serious detriment."
>
> * * * *
>
> ". . . Since parole eligibility is considered an integral part of any sentence, cf. *Warden v. Marrero,*

> 417 U.S. 653, 663, 94 S.Ct. 2532, 41 L.Ed.2d 383 (1974), official past-sentence action that delays eligibility for supervised release runs afoul of the ex post facto proscription. . . . This result follows even if the maximum statutory penalty for the crime remains unchanged. See *Lindsey v. Washington,* 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937)."

The difficulty that has arisen from the *Shepard* decision is generated by the language Chief Judge Kaufman used to indicate the narrow scope of the holding. Under the Youthful Offender Act there had been the stricture that "severity" of the offense was not a factor. Hence the addition of the "severity" test added an element which operated to the offender's detriment.

Where, prior to the guidelines, there were no impediments to the informed discretion of the Parole Commission, the adoption of the Guidelines was an expression of rules which did not add any burden to the offender. It was in that context that the *Shepard* decision contains the following sentence (586 F.2d at p. 654):

> "It is equally clear that the guidelines do not constitute impermissible *ex post facto* laws when applied to an adult offender since, in such an instance, they merely clarify the exercise of administrative discretion without altering any existing considerations for parole release.

The description of the offender as an "adult offender" clearly demonstrates that it was the clash of the Guidelines with the absence of the "severity" factor from the Youthful Offender Act that created the *ex post facto* violation. In the case at bar the new RICO guideline clashes with the absence of a prior RICO guideline.

Priore v. Nelson, 626 F.2d. 211 (1980) the second of its decisions upon which the Second Circuit Court of Appeals relied, fitted exactly into the language used by Chief Judge Kaufman to explain a case in which the adoption of guidelines and their application would not run counter to the *ex post facto* prohibition.

Priore was a prisoner who committed the crime for which he was sentenced before the adoption of the Guidelines. He was sentenced after they came into being. He claimed they increased his time of incarceration over the punishment he would have received were the Parole Commission not fettered by its Guidelines.

The Court of Appeals rejected Priore's claim for the stated reason that he was sentenced after the Guidelines were adopted. It then supported its decision with the language used by Chief Judge Kaufman in *Shepard* to hypothesize a case to which *ex post facto* considerations would not apply (626 F.2d. at p. 217), repeating:

> ". . . they 'merely clarify the exercise of administrative discretion without altering any existing considerations for parole release.' "

In the case at bar, the addition of the RICO requirement certainly altered the existing considerations for parole release.

The principles enunciated by this Court in *Weaver v. Graham,* 450 U.S. 24, 67 L. Ed.2d 7, 101 S.Ct. 960 govern this case.

Weaver v. Graham (supra) clearly held that the creation of increased punishment after the commission of the offense is prohibited by the *ex post facto* clause.

The basic consideration spelled out by this Court is the fundament that the clause

> "forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred." (450 U.S. at p. 30).

The petitioner in *Weaver* pleaded guilty to second degree murder under a plea agreement which took place on January 31, 1976. Florida had a statute at that time which provided a formula for deducting gain time credits from the sentence of prisoners who were diligent and peaceful.

Florida repealed the earlier statute and enacted a new one for gain time deductions. The State applied the formula to all prisoners whose offenses took place before that date, and petitioner claimed that the new formula extended his required time in prison by over two years. This Court held that a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the calculation of the sentence to be imposed by the judge (450 U.S. at p. 32, 67 L.Ed. 2d at p. 25). It concluded (450 U.S. at pp. 35, 36 67 L.Ed 2d at p. 27):

> "Thus the new provision constricts the inmate's opportunity to earn early release and thereby makes more onerous the punishment for crimes committed before its enactment. This result runs afoul of the prohibition against ex post facto laws."

In seeking to distinguish *Weaver* from this case, Chief Judge Feinberg said (764 F.2d at p. 146):

> "Under both the 1979 and the 1983 versions of the Parole Commission's guidelines, the Commis-

> sion remains free to recommend a parole date either above or below the guidelines, 'if it determines there is good cause for so doing.' 18 U.S.C. §4206(c). In addition, the Commission has explicitly retained, in its regulations, the discretion to revise or modify the guidelines at any time as deemed appropriate. 28 C.F.R. §20(g) (provision contained in both the 1979 and 1983 Guidelines)."

The provision for revision or modification of the Guidelines in the Parole Commission's discretion is utterly meaningless if, as Chief Judge Feinberg indicated, they are mere "guideposts" (citing *Ruip v. U.S.*, 555 F.2d 1331, 1335 (6th Cir. 1977). If the Commission is free to adhere to the Guidelines, as its informed discretion would dictate, there is no need for a provision authorizing modification or revision. It need merely state a reason and depart from the Guidelines.

And where the granting of a reduced indicated term of imprisonment would depart from the Guidelines only in the discretion of the Commission, such an appeal to discretion was held in *Weaver* to be a factor which weighed additionally on the prisoner (450 U.S. at p. 35, 67 L.Ed.2d at p. 27).

> "To make up the difference, the inmate has to satisfy the extra conditions specified by the discretionary gain-time provisions. Even then, the amount of the extra gain time is purely discretionary, contingent on both the wishes of the correctional authorities and special behavior by the inmate, such as saving a life or diligent performance in an academic program."

There seem to be no guideposts by which petitioner in the case at bar could appeal to the discretion of the Parole

Commission to overcome the applicaton to him of the RICO guideline of additional time.

The discretion of the Parole Commission seems to be no discretion at all. In order to determine how really flexible the Parole Commission was, the Third Circuit Court of Appeals directed United States District Judge Richard C. Conaboy (USDC Middle Dist. Pa.) (*US ex rel. Forman v. McCall,* 709 F.2d 852 [1983]) to conduct a hearing and make findings as to the role of discretion in decision making by the Parole Commission under its guidelines.

In order to comply, Judge Conaboy conducted conferences, received extensive expert reports and opposing briefs, and held a hearing at which experts testified in support of opposing positions.

Contrary to the arguments of the respondents in that case, that the guidelines are merely rules that govern their methods rather than bind their determination, he found (memorandum and order, Civil No. 81-0553, D.C., Middle Dist. Pa., Sept. 14, 1984), that the Commission rarely departed from the Guidelines.

> "Having reached these clear and concise factual findings from the vast amount of information provided by the parties, we must now apply them to the mandates of the Appellate Court's Order. *United States ex rel. Forman v. McCall,* 709 F. 2d 852 (1983). In doing so, we find that the guidelines are woodenly applied, thus constituting an 'unyielding conduit', *Id.* at 863, void of 'substantial flexibility'. *Id.* at 862.
>
> Having reached the conclusion that the Parole Commisson Guidelines are not applied in a discretionary fashion nor with 'substantial flexibility' we

> must conclude, as a finding of fact, that the Parole Commission Guidelines constitute 'laws' within the meaning of the ex post facto clause."

In commenting upon *Weaver v. Graham,* the United States Court of Appeals for the Third Circuit noted in *United States v. Ferri,* 625 F.2d 325, 327, 328 (1981):

> "The net effect of Weaver, as applied here, would appear to render violative of the ex post facto clause a statute which operates retrospectively and which significantly diminishes a prisoner's opportunity to reduce his period of incarceration and thereby increases his punishment.
>
> The reasoning of the Supreme Court in *Weaver v. Graham* would appear to strengthen the views expressed by this Court in *Geraghty.* We concluded in *Geraghty* that there is a potential violation of the ex post facto clause in the retrospective application of new guidelines promulgated by the United States Parole Commission when they were applied to prisoners who were sentenced prior to enactment of the statute in 1976. This same rationale may apply to Matthew because he was sentenced in 1975."

Neither Congress nor the Parole Commission may create retroactive application of increased punishment.

The regulation passed by the Parole Commission which it calls guidelines was concededly authorized by Congress. What Congress is forbidden to do, it may not authorize others to do. The Parole Commission may not pass an *ex post facto* law, because Congress may not.

Rodriguez v. United States Parole Commission, 594 F.2d 170 (7th Cir. 1979) dealt with the elimination of a hearing which had customarily been held at the one-third

point of a sentence. The court held that the elimination of the one-third hearing, which would have given Rodriguez a meaningful inquiry at the end of eight months and the substitution therefor of a hearing at the end of eighteen additional months, was a violation of the *ex post facto* law prohibition of the Constitution. The court stated (173, 174, 176):

> "The first part of this inquiry, whether the regulation involved here in equivalent to a 'statute' for purposes of the clause, need not detain us long. Where Congress has delegated to an agency the authority to make a rule instead of making the rule itself, the resulting administrative rule is an extension of the statute for purposes of the clause. What Congress cannot do directly, it cannot do by delegation. See, E.G., Geraghty v. United States Parole Commission, 579 F.2d 238, 266 & n. 143 (3d Cir. 1978), cert. granted, ____ U.S. ____, 99 S.Ct.1420, 29 L.Ed. 2d 632 (1979). The Act expressly authorizes the commission to adopt 'rules and regulations as are necessary to carry out a national parole policy.' 18 U.S.C. §4203(a)(1). 'Legislative' rules adopted by the commission pursuant to statutory power have the force and effect of law. See generally *Joseph v. United States Civil Service Commission,* 180 U.S. App. D.C. 281, 295 n. 26, 554 F.2d 1140, 1154, n. 26 (1977); Davis, Administrative Law of the Seventies §5.03 at 147 (1976)."

The Court of Appeals for the Fifth Circuit held in *U.S. ex rel. Graham v. U.S. Parole Commission,* 629 F.2d 1040 (1980) that where a guideline affected a substantive right to parole eligibility it should be treated as a statute would be treated under the restrictions of the *ex post facto* clause. It said (629 F.2d at p. 1043):

> ". . . however, if the statute or the regulations affect a prisoner's substantive right to parole eligibility, neither can be so applied retroactively without violating the ex post facto clause."

The court sent the matter back to the District Court to determine whether the determination of factors for the exercise of the Commission's discretion substantially diminished or eliminated the petitioner's eligibility for parole.

The "woodenly applied" concept of guidelines as found by District Judge Conaboy in *Forman* (*supra*, U.S.D.C. Middle Dist. Pa.) finds justification, and thus statutory status, in the Parole Commission Act itself. In *Allen v. Hadden,* 536 F. Supp. 586, 595 (D.C. Col. 1982), the court explained:

> "Although the commission may make a parole determination outside of the guidelines, see 28 C.P.R. §2.20(c)(d), it must issue a written notice stating its reasons for doing so. 18 U.S.C. §4206(c). It is therefore essential that the commission first follow faithfully its own regulations in applying the guidelines."

The need to follow its own regulations, the genesis of those regulations in the power of Congress and the substantive nature of the increased punishment of the RICO regulation in the case at bar combine to give to the Guidelines in this case the status of a statute which is subject to the *ex post facto* prohibition.

In failing to consider the plea bargain the Court of Appeals rejected the principle that a promise must be fulfilled when it constitutes a part of the inducement or consideration of a plea.

When a plea of innocence is withdrawn and a plea of guilty is entered and accepted by a court on the basis of a promise by the prosecution, that promise must be fulfilled. The rule is founded on constitutional principles and was specifically articulated in *Santobello v. New York*, 404 U.S. 257, 262, 30 L.Ed. 427, 433, 92 S.Ct. 495 (1971), where this Court stated:

> "This phase of the process of criminal justice and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."

That the principles of *Santobello* have been applied to cases involving parole is illustrated in *Geisser v. U.S.*, 513 F.2d 862 (5th Cir. 1975). That case involved the breach of a plea bargain made with the Department of Justice which promised parole after three years imprisonment. The District Court ordered release of the prisoner and, on appeal, the Department argued that the District Court usurped the exclusive power of the parole board by ordering release. The Court of Appeals, however, concluded that such a bargain "fits well within the realm of enforceable constitutional rights" (513 F.2d at 869 n. 11).

The reality of litigation was reflected in the plea bargain made in this case. If the covenant not to communicate may be disgarded, there was no meaning at all to the covenant. The fact is that after a mistrial the Government was satisfied if it achieved a conviction. The Petitioner at the same time was satisfied with the promise that he would not be held responsible for involvement in a sum greater than $33,000.

The provision in the case at bar, entailing the consideration that no communication to the Parole Commission would deal with a sum in excess of $33,000, had great significance to petitioner and his counsel. The significance arises from the generally accepted view that the Parole Commission is not an investigative agency. It considers information presented to it, but has no function or obligation to seek additional information.

District Judge Egintion in the District Court in Connecticut held in *Iuteri v. Nardoza*, 560 F.S. 745, 753 (1983):

> "This court's conclusion is consistent with the interpretation made by other courts and makes sense in light of the function of the Commission as a record reviewing, not an investigative agency. *Fardella v. Garrison*, 698 F.2d 208 (4th Cir. 1983); *McClanahan v. Mulcrome*, 636 F.2d 1190, 1191 (10th Cir. 1980); *Fox v. United States Parole Commission*, 417 F. Supp. 855 (D. Kan. 1981); see *Iuteri v. Nardoza*, 662 F.2d 159 (2nd Cir. 1981). It considers information presented to is, see 18 U.S.C. §4207 but is under no obligation to seek additional information."

The minutes of the District Court session at which the plea bargain was made (13a) demonstrate that the promise

was made that in no communications to the Parole Commission would there be reference to more than $33,000.

It was appellant's claim that he was never involved in more than $33,000, although the count to which he pleaded made reference to $100,000.

The Parole Commission and the United States Attorney for the Eastern District are both component parts of the Department of Justice. When the appellant made his agreement with the "Government," he was making it with the entire government. Specifically, the spokesman was the Assistant United States Attorney with authority to act for his department.

In a different context, but relevant with regard to the perception of petitioner, is that every department of the panoply of agencies which constitutes the United States of America is subsumed within the concept of "Government."

Thus, in *United States v. Bryant*, 439 F.2d 642, 650 (D.C. Cir. 1971), the court held:

> "The fact that it was the Bureau of Narcotics and Dangerous Drugs, and not the United States Attorney's office, which had possession of the tape in these cases does not render it any less discoverable. The duty of disclosure affects not only the prosecutor, but the Government as a whole, including its investigative agencies."

See also, *United States v. Rosenberg*, 299 F.S. 1241 (S.D. N.Y. 1969) which involved transcripts and conversations with an Internal Revenue Service official on occasions of alleged bribes and *United States v. Mosely*, 266 F.S. 834, (D.D.N.Y. 1967), which dealt with statements to postal inspectors.

CONCLUSION.

The Petition For A Writ Of Certiorari Should Be Granted.

Respectfully submitted,

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Appendix A—Order and Opinion of the United States Court of Appeals for the Second Circuit, Decided June 13, 1985.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of June one thousand nine hundred and eighty-five

Present:

Hon. Wilfred Feinberg,
Chief Judge
Hon. Ellsworth A. Van Garaafeiland,
Hon. Lawrence W. Pierce,
Circuit Judges,

VINCENT DINAPOLI,

Plaintiff-Appellant,

v.

NORTHEAST REGIONAL PAROLE COMMISSION, UNITED STATES PAROLE COMMISSION, DENNIS LUTHER, Warden, Federal Correctional Institution, Danbury, Conn.,; and WILLIAM FRENCH SMITH, Attorney General of United States of America,

Defendants-Appellees.

No. 85-2054

Appeal from the United States District Court for the District of Connecticut

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

ELAINE B. GOLDSMITH
Clerk

By: EDWARD J. GUARDARO
Deputy Clerk

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT

VINCENT DiNAPOLI,

Petitioner-Appellant,

v.

NORTHEAST REGIONAL PAROLE COMMISSION, UNITED STATES PAROLE COMMISSION, DENNIS LUTHER, Warden, Federal Correctional Institution, Danbury, Connecticut, and WILLIAM FRENCH SMITH, Attorney General, Department of Justice,

Respondents-Appellees.

No. 1264, Docket 85-2054

Argued May 20, 1985.

Decided June 13, 1985.

Charles Haydon, New York City (Dublirer, Haydon, Straci & Victor, New York City, of counsel), for petitioner-appellant.

Barry K. Stevens, Asst. U.S. Atty., D. Conn., Bridgeport, Conn. (Alan H. Nevas, U.S. Atty., D. Conn., New Haven, Conn., of counsel), for respondents-appellees.

Before Feinberg, Chief Judge, and Van Graafeiland and Pierce, Circuit Judges.

Feinberg, Chief Judge:

Vincent DiNapoli appeals from an order of the United States District Court for the District of Connecticut, T.F. Gilroy Daly, Chief Judge, denying his petition for a writ of habeas corpus. DiNapoli is currently serving a five-year term of imprisonment, entered in the United States District Court for the Eastern District of New York after his plea of guilty to one count of racketeering in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c). DiNapoli offers two grounds for granting the writ. First, he claims that the United States Parole Commission violated the Constitution's prohibition against ex post facto laws, U.S. Const. art. I, § 9, cl. 3, by applying parole guidelines that were not in effect at the time of his offense, plea agreement or sentencing. Second, he contends that his plea agreement was violated by the Parole Commission's consideration of certain information in determining how much time he should serve before release. For the reasons stated below, we affirm the judgment of the district court.

I.

In pleading guilty to engaging in a "pattern of racketeering activity" in violation of RICO, DiNapoli had to, and did, admit to committing two predicate offenses, 18 U.S.C. § 1961(5). The first offense involved actual receipt of approximately $33,000 in return for a promise of "labor peace" at a particular construction site. The second involved an attempt to extort approximately $100,000 in connection with another construction project. The plea agreement entered into by appellant and the government was not reduced to writing. As stated by appellant's counsel at the entry of the plea, the relevant portion of the agreement is as follows:

> Mr. DiNapoli voluntarily said, proposed, authorized to offer that he will return the $33,000 which was involved, to the Government and that the Government in turn is not going to claim in their communications to the Parole Commission as to the part which deals with the amount involved and it will not claim an amount in excess of $33,000, which Mr. DiNapoli has voluntarily agreed to return.

DiNapoli pled guilty on April 16, 1982 and was sentenced on July 19. Apparently due to illness, he did not begin serving his sentence until March 2, 1983. He received his initial parole hearing before an examiner panel of the Parole Commission on August 23, 1983. In a Notice of Action dated September 20, 1983, the Commission concluded that under its existing regulations, 28 C.F.R. § 2.10 *et seq.* (1983)(1983 Guidelines), DiNapoli had an "offense severity rating" of Category Five, *id.* § 2.20, which, when combined with his "salient factor score" of six, indicated a range of incarceration of 36 to 48 months before parole. *Id.*; *see Roth v. United States Parole Comm'n*, 724 F.2d

836, 837-38 (9th Cir. 1984) (describing operation of Parole Commission). The Commission further concluded that a decision outside the guidelines was not warranted.

In a Notice of Action on Appeal dated March 22, 1984, the National Appeals Board of the Parole Commission affirmed the Commission's earlier decision, stating that "[t]he Commission has maintained the position that the guidelines in effect at the time of the initial hearing are to be utilized." Applying those guidelines, the Board concluded that "[y]our offense severity rating has been correctly rated as Category Five because, as you state, you were convicted under the RICO statute." The Board then went on to note that even under the earlier guidelines "your offense still would have been rated as at least Category Five because it involved receipt or attempted receipt of monies for labor peace exceeding $100,000." Finally, after affirming the calculation of DiNapoli's "salient factor score," the Board stated that "in view of the seriousness of your offense, a more lenient decision [than the indicated 36 to 48 months] is not warranted."

DiNapoli brought this habeas corpus action in the United States District Court for the Eastern District of Pennsylvania, which then transferred the case to the District of Connecticut, the district in which DiNapoli is confined. In an order dated January 25, 1985, Chief Judge T.F. Gilroy Daly denied the petition "[f]or the reasons stated in the government's response." This appeal followed.

II.

[1] The ex post facto clause, U.S. Const. art. I, § 9, cl. 3, forbids the Congress from passing any law " 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.' " *Weaver v. Graham*, 450 U.S. 24, 28, 101 S.Ct. 960, 963, 67 L.Ed.2d 17 (1981)

(quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325-26, 18 L.Ed. 356 (1867)). The clause serves both to assure that legislative acts give fair warning about new punishments and to discourage arbitrary and oppressive legislation. *Weaver, supra*, 450 U.S. at 28-29, 101 S.Ct. at 963-64. In accord with these purposes, the Supreme Court has identified

> two critical elements [that] must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it.

Id. at 29, 101 S.Ct. at 964 (footnotes omitted).

Appellant contends that the Parole Commission violated the Constitution's prohibition against ex post facto laws by applying the 1983 Guidelines, which were in effect at the time of his parole hearing, rather than the guidelines in force at the time of his offense, plea bargain and sentencing (the 1979 Guidelines). He argues as follows. In setting appellant's offense severity rating at five, and hence his indicated time of incarceration at 36 to 48 months, the Commission relied on the special category for RICO offenses in the 1983 Guidelines, 28 C.F.R. § 2.20, ch. 11, subch. A, § 1101 (1983), a category not contained in the 1979 Guidelines. Had those earlier guidelines been applied, and had the Parole Commission not considered the $100,000 offense (as appellant claims the plea agreement bound them not to), he would have received a lower offense severity rating and an indicated time of incarceration of only 20 to 26 months. Appellant concludes that application of the 1983 Guidelines in this case violates the ex post facto clause because it " 'makes more burdensome the punishment for a crime, after its commission.' " *Dobbert v. Florida*, 432 U.S. 282, 292, 97 S.Ct. 2290,

2298, 53 L.Ed.2d 344 (1977)(quoting *Beazell v. Ohio*, 269 U.S. 167, 169, 46 S.Ct. 68, 70 L.Ed. 216 (1925)).

[2] The government does not dispute that the Commission retrospectively applied the 1983 Guidelines in that it applied them to an offense committed before they had become effective. And for the purposes of this petition, despite the government's claim to the contrary, we accept appellant's contention that had the 1979 Guidelines been applied, and had the Commission not considered the $100,000 offense, he would have received an earlier indicated parole date. Nevertheless, because under this court's precedents the federal parole guidelines applied to appellant are not "laws" within the meaning of the ex post facto clause, *Priore v. Nelson*, 626 F.2d 211, 217 (2d Cir.1980); *Shepard v. Taylor*, 556 F.2d 648, 654 (2d Cir.1977) (dictum), appellant's claim is without merit. In both *Priore* and *Shepard* we cited with approval the Sixth Circuit's opinion in *Ruip v. United States*, 555 F.2d 1331 (6th Cir. 1977), which states:

> These guidelines are not law, but guideposts which assist the Parole Commission . . . in exercising its discretion. Nor do these guidelines have the characteristics of law. They are not fixed and rigid, but are flexible. The Commission remains free to make parole decisions outside of these guidelines.

555 F.2d at 1335. *See also Zeidman v. United States Parole Comm'n*, 593 F.2d 806, 808 (7th Cir. 1979); *Rifai v. United States Parole Comm'n*, 586 F.2d 695, 698 (9th Cir.1978); *Richards v. Crawford*, 437 F.Supp. 453, 456 (D.Conn.1977) (Newman, J.).

Appellant relies on the Supreme Court's 1981 decision in *Weaver v. Graham, supra*, for the proposition that *Priore, Shepard* and the other cases cited above are no longer good law. This reliance is misplaced. *Weaver* in-

volved repeal of a state statute mandating certain non-discriminatory, automatically calculated deductions from a prisoner's sentence as "gain time" for good conduct, and passage of a similar statute providing for smaller "gain time" deductions. 450 U.S. at 26-27, 101 S.Ct. at 962-963. A prisoner whose offense and sentencing predated the new law claimed that application of that law to him violated the Constitution's prohibition against ex post facto laws. The Supreme Court agreed, stating that as applied the new law "makes more onerous the punishment for crimes committed before its enactment." *Id.* at 36, 101 S.Ct. at 968. Because there was no discretion in awarding the mandated gain time, the change in the formula by which that time was calculated automatically lengthened the term of incarceration for prisoners who obeyed the institutional rules. 450 U.S. at 34-36, 101 S.Ct. at 967-968.

Weaver is not controlling here. DiNapoli challenges guidelines promulgated to guide an agency's discretion, not a statute granting a mandatory entitlement to gain time. Under both the 1979 and 1983 versions of the Parole Commission's guidelines, the Commission remains free to recommend a parole date either above or below the guidelines, "if it determines there is good cause for so doing." 18 U.S.C. § 4206(c). In addition, the Commission has explicitly retained, in its regulations, the discretion to revise or modify the guidelines at any time as deemed appropriate. 28 C.F.R. § 2.20(g) (provision contained in both the 1979 and 1983 Guidelines).

The weight of post-*Weaver* authority supports this view. *See Dufresne v. Baer*, 744 F.2d 1543, 1548-50 (11th Cir.1984); *Paschal v. Wainwright*, 738 F.2d 1173, 1180-81 (11th Cir.1984); *Roth v. United States Parole Comm'n*, 724 F.2d 836, 840 (9th Cir.1984); *Prater v. United States Parole Comm'n*, 575 F.Supp. 284, 286-87 (S.D.Ind.1983); *Benedict v. United States Parole Comm'n*, 569 F.Supp. 438 (E.D.Mich.1983). It is true that the Third Circuit held to the contrary in *United States ex rel. Forman v. McCall*,

709 F.2d 852 (3d Cir.1983), which relied on that court's earier decision in *Geraghty v. United States Parole Comm'n*, 579 F.2d 238 (3d Cir.1978), *vacated on other grounds*, 445 U.S. 388, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980). As one court recently noted, however, the reasoning of *Geraghty*, and in turn of *Forman*, "has been expressly or implicitly rejected by every other Circuit Court of Appeals that has assessed the ex post facto effect of the U.S. Parole Commission guidelines in adult cases, and a number of state courts deciding similar issues." *Paschal v. Wainwright, supra*, 738 F.2d at 1181 n. 12 (citing cases). Even if we agree that "[u]nbounded discretion probably does not exist in the Commission's decisionmaking," *Forman, supra*, 709 F.2d at 861, and that "changes in the guidelines appear to shape the exercise of that discretion," *id.*, the Commission does retain substantial discretion to go above or below the guidelines, *Bialkin v. Baer*, 719 F.2d 590, 594-95 (2d Cir. 1983). Accordingly, we adhere to our view that federal parole guidelines as applied here are not "laws" within the meaning of the ex post facto clause and affirm the denial of appellant's ex post facto claim.

III.

Appellant claims, in effect, that in the plea agreement the government bound the Parole Commission not to consider the $100,000 offense in setting appellant's presumptive release date. For its part, the government contends that the agreement only bars the prosecutor from communicating the challenged information to the Parole Commission, and that no such communication was made. Having concluded that application of the 1983 Guidelines was permissible, however, we need not resolve this dispute over the meaning of the plea agreement because appellant's claim for relief turns on application of the 1979 Guidelines. Under the 1979 Guidelines, which contain no special provision for RICO offenses, had the Com-

mission considered only the $33,000 offense appellant would presumptively have received a lower offense severity rating and hence a guideline range of 20 to 26 months. Under the 1983 Guidelines, however, the dollar amount of appellant's offense had no effect on the calculation of the guideline range.

In its final Notice of Action on Appeal, the Commission, taking the position that the 1983 Guidelines apply, concluded that "[y]our offense severity has been correctly rated as Category Five because, as you state, you were convicted under the RICO statute." This conclusion was reached without reference to the $100,000 offense; a RICO violation under the 1983 Guidelines warrants an offense severity rating of at least five, regardless of the amount of money involved, 28 C.F.R. § 2.20, ch. 11, subch. A, § 1101 (1983). Apparently in response to appellant's claim that application of the 1983 Guidelines would be unconstitutional, the Commission did go on to note that even under the 1979 Guidelines "your offense still would have been rated as at least Category Five because it involved receipt or attempted receipt of monies for labor peace exceeding $100,000." Since we have concluded that application of the 1983 Guidelines was permissible, this reference to the $100,000 offense is immaterial and did not work to appellant's detriment. We are convinced that had the Commission never learned of that offense appellant still would have received an indicated length of service of 36 to 48 months. Accordingly, appellant's claim that the government breached the plea agreement is to no avail.

The judgment of the district court is affirmed.

(2)

No. 85-335

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

VINCENT DiNAPOLI, PETITIONER

v.

NORTHEAST REGIONAL PAROLE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Parole Commission's consideration of petitioner's eligibility for parole under guidelines in effect at the time of his parole hearing, rather than those in effect at the time the offense was committed, violated the Ex Post Facto Clause.

2. Whether petitioner's plea agreement was violated because the Parole Commission, when it concluded that petitioner's release date would in any event have been the same under the guidelines in effect when he committed the offense, determined that the amount of money involved in the offense was in excess of that mentioned in the plea agreement.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-335

VINCENT DINAPOLI, PETITIONER

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NORTHEAST REGIONAL PAROLE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-11a) is reported at 764 F.2d 143.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1985. The petition for a writ of certiorari was filed on August 29, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After pleading guilty to one count of racketeering, in violation of 18 U.S.C. 1962(c), petitioner was sentenced to a five-year term of imprisonment and a $25,000 fine.

1. Petitioner was the owner of several dry wall and carpentry companies in the Bronx, New York (C.A. App. 43). He was indicted with several others for demanding and

accepting payments for labor peace for various construction projects (*id.* at 42-54). Petitioner agreed in pleading guilty that he had committed two predicate offenses under the racketeering statute, 18 U.S.C. 1961(5). The first involved the actual receipt in 1979 of $33,000, and the second involved an attempt to extort $100,000 in connection with another construction project (C.A. App. 13, 76). Under the plea agreement, petitioner agreed to repay the $33,000 and the prosecution agreed that it would not claim in its communications to the Parole Commission that the amount involved in the offense was more than $33,000 (Pet. App. 5a).

Petitioner began serving his sentence on March 2, 1983 (Pet. App. 5a), and he received his initial parole hearing on August 23, 1983 (C.A. App. 76). The Parole Commission found after the hearing that under the parole guidelines then in effect (28 C.F.R. 2.20 (1983)), petitioner had an "offense severity rating" of Category Five because his offense "involved racketeering influence of more than $100,000.00 but not more than $500,000.00" (C.A. App. 77). The Commission also found, in light of petitioner's criminal history, that his "salient factor score" under the guidelines was six. Based on this combination of petitioner's offense severity rating and his salient factor score, the guidelines indicated that petitioner should serve between 36 and 48 months in prison (*id.* at 55, 77). The Commission further determined that there was no reason to release petitioner on parole prior to the expiration of 36 months. Because petitioner's statutory release date fell within the parole guideline range, the Commission concluded that he should be continued in prison to the expiration of his sentence, less good time credits (C.A. App. 55).

On March 22, 1984, the National Appeals Board of the Parole Commission affirmed the initial decision (C.A. App. 56). It stated that "[t]he Commission has maintained the position that the guidelines in effect at the time of the initial

hearing are to be utilized unless subsequent guidelines are adopted which would lessen the punishment for the offender" (*id.* at 57). The Appeals Board also informed petitioner (*ibid.*):

> Your offense severity has been correctly rated as Category Five because * * * you were convicted under the RICO statute, 18 U.S.C., Section 1962. However, prior to adoption of the current guidelines, your offense still would have been rated as at least Category Five because it involved receipt or attempted receipt of monies for labor peace exceeding $100,000. The Presentence Report indicates that you and your codefendants would have received $100,000 from another victim which was not paid because the government's investigation surfaced at that point.

2. On August 28, 1984, petitioner filed a petition for a writ of habeas corpus. He alleged that the use of parole guidelines different from those in effect at the time he committed the offense violated the Ex Post Facto Clause of the Constitution (Art. I, § 9, Cl. 3) and that the plea agreement had been violated because the Parole Commission had considered an amount involved in the offense in excess of the $33,000 mentioned in the plea agreement (C.A. App. 4-5). The district court denied the petition (*id.* at 81).

3. The court of appeals affirmed (Pet. App. 3a-11a). It held that the Parole Commission's use of the guidelines in effect when petitioner's parole hearing was held in 1983, rather than those in effect when the offense was committed in 1979, did not violate the Ex Post Facto Clause. The court reasoned that the parole guidelines are not "Laws" within the meaning of the Ex Post Facto Clause, but instead are flexible administrative guideposts intended to assist the Parole Commission in the exercise of its discretion, and that a revision of the guidelines therefore does not implicate the

Ex Post Facto Clause (Pet. App. 8a-10a). The court of appeals did not reach the question whether the plea agreement had been violated by the Commission's alternative application of the 1979 guidelines, because in the court's view the Commission was permitted to apply the 1983 guidelines and the Commission did not rely on the $100,000 offense amount in applying the 1983 guidelines (*id.* at 10a-11a).

ARGUMENT

1. Petitioner contends (Pet. 8-17) that the Commission's application to him of parole guidelines promulgated after he committed his offense violated the Ex Post Facto Clause. For two reasons, this contention does not warrant review.

First, petitioner has not established that the result would have been different if the Commission had relied on the 1979 guidelines. The 1979 guidelines did not contain a provision specifically applicable to RICO offenses. However, the Commission informed petitioner that his offense would have been given the same offense severity rating even under the 1979 guidelines (Pet. App. 6a). Furthermore, even if, as petitioner asserts, his offense would have been rated in Category Four, the Parole Commission was free to set a release date above the suggested guidelines range. In light of the amount of money involved and the fact that the 1979 parole guidelines did not specifically cover RICO offenses, it is entirely possible that the Parole Commission would have done so.

Second, even assuming that petitioner would have received an earlier release date under the 1979 guidelines, the court of appeals correctly held that the application of the 1983 guidelines to his case did not violate the Ex Post Facto Clause. That Clause provides that "No Bill of Attainder or ex post facto Law shall be passed." Only Congress can "pass" a "Law." U.S. Const. Art. I, § 9; *INS* v. *Chadha*, 462 U.S. 919 (1983). Thus, it is clear that the

Clause is addressed to actions of the Legislature, not those of an Executive agency, such as the Parole Commission, that are taken pursuant to a duly enacted law that remains unchanged. As the court of appeals explained, "[t]he clause serves both to assure that legislative acts give fair warning about new punishments and to discourage arbitrary and oppressive legislation" (Pet. App. 7a). See *Weaver* v. *Graham*, 450 U.S. 24, 28-29 (1981). In this case, the relevant statutory provision governing petitioner's release on parole, 18 U.S.C. 4206(a), was enacted in 1976, and it has not been amended since that time.[1] There accordingly has been no "Law" "passed" by Congress since petitioner committed the offense in 1979 that has affected the criteria for his release on parole.

The amendment of the 1979 guidelines in 1983 to incorporate specific guidelines applicable to petitioner's RICO offense does not implicate ex post facto concerns. In 18 U.S.C. 4206, Congress granted the Parole Commission broad discretion in granting parole, just as the judiciary traditionally has had broad discretion under criminal statutes with regard to sentencing. A change in the parole guidelines no more implicates the Ex Post Facto Clause than would a change in judicial sentencing practices. The governing statutes give ample notice that such changes may occur under the broad discretion conferred on the Judicial and Executive Branches. The courts of appeals thus have generally rejected ex post facto claims based on changes in the parole guidelines. See *Inglese* v. *United States Parole Commission*, 768 F.2d 932, 935-939 (7th Cir. 1985);

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[1]The existing statutory provisions governing parole were repealed, effective November 1, 1986, by Sections 218(a)(5) and 235 of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2027, 2031. However, under Section 235(b)(1) of that Act, 98 Stat. 2032, the parole provisions will remain in effect for five additional years with respect to any individual convicted prior to that date.

Dufresne v. *Baer*, 744 F.2d 1543, 1548-1550 (11th Cir. 1984), cert. denied, No. 84-1522 (Oct. 7, 1985); *Paschal* v. *Wainwright*, 738 F.2d 1173, 1180-1181 (11th Cir. 1984); *Roth* v. *United States Parole Commission*, 724 F.2d 836, 840 (9th Cir. 1984); *Artez* v. *Mulcrone*, 673 F.2d 1169, 1171 (10th Cir. 1982); *Warren* v. *United States Parole Commission*, 659 F.2d 183, 195-196 (D.C. Cir. 1981), cert. denied, 455 U.S. 950 (1982); *Hayward* v. *United States Parole Commission*, 659 F.2d 857, 862 (8th Cir. 1981), cert. denied, 456 U.S. 935 (1982); *Rifai* v. *United States Parole Commission*, 586 F.2d 695 (9th Cir. 1978); *Shepard* v. *Taylor*, 556 F.2d 648 (2d Cir. 1977); *Ruip* v. *United States*, 555 F.2d 1331 (6th Cir. 1977). See also *Portley* v. *Grossman*, 444 U.S. 1311 (1980) (Rehnquist, C.J.).[2]

Contrary to petitioner's apparent assertion (see Pet. 14-15), the decision below does not conflict with the decision of the Third Circuit in *United States ex rel. Forman* v. *McCall*, 709 F.2d 852 (1983). The Third Circuit in *Forman* did not hold that the use of revised parole guidelines violated the Ex Post Facto Clause; it merely remanded the case to the district court for a factual determination whether the parole guidelines are inflexibly applied and therefore are, in the court of appeals' view, "Laws" for purposes of ex post facto analysis. 709 F.2d at 862.[3] This Court repeatedly has

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[2]By contrast, in *Weaver* v. *Graham, supra*, upon which petitioner relies (Pet. 8, 11-15), the legislature had amended the statute that adversely affected the prisoner with respect to the length of his incarceration. See Pet. App. 8a-9a.

[3]As petitioner notes (Pet. 14-15), the district court subsequently found as a matter of *fact* that the parole guidelines are "Laws" within the meaning of the Ex Post Facto Clause. The government has taken an appeal from that decision. No. 84-5755 (3d Cir.). The case was argued on June 10, 1985, and was still under submission at the time this brief in opposition was prepared. The argument in *Forman* was consolidated with that in *Royster* v. *Fauver*, No. 84-5887, which was decided on October 18, 1985. The Third Circuit observed in *Royster* that it "maintains that parole regulations may be laws for purposes of ex post fact[o]

declined to grant certiorari in other cases in which the petitioner has asserted a conflict with the Third Circuit's decision in *Forman*, most recently in *Dufresne* v. *Baer, supra*. See also *Gregorio* v. *United States Parole Commission*, cert. denied, No. 83-5699 (Feb. 21, 1984); *Walker* v. *United States Parole Commission*, cert. denied, No. 83-6237 (June 11, 1984); *Hood* v. *United States Parole Commission*, cert. denied, No. 83-6263 (June 11, 1984). There is no reason for a different result here.

2. Petitioner's fact-bound claim (Pet. 18-20) that the Parole Commission violated the plea agreement by considering the $100,000 offense does not merit review by this Court. The prosecution did not violate the plea agreement; in accordance with that agreement, it did not suggest to the Parole Commission that the Commission should rely on the $100,000 offense in setting petitioner's release date. Furthermore, the court of appeals found that the National Appeals Board did not rely on the $100,000 offense in determining petitioner's release date under the 1983 guidelines, which were properly applied in this case (Pet. App. 10a-11a). Petitioner therefore has not identified any concrete injury as a result of the Commission's awareness of the $100,000 offense amount.

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analysis" (slip op. 17), but it declined to resolve that issue because the appellant had failed to demonstrate that a new state parole statute provided stricter parole standards than an old statute or to demonstrate that he was prejudiced by a change in the state parole guidelines. Slip op. 17-18.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1985

DOJ-1985-11

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NORTHEAST REGIONAL PAROLE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENTS

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-335

VINCENT DI NAPOLI, PETITIONER

v.

NORTHEAST REGIONAL PAROLE COMMISSION, ET AL.

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SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENTS

Pursuant to Rule 22.6 of the Rules of this Court, we respectfully file this supplemental memorandum to bring to the Court's attention the recent decision of the United States Court of Appeals for the Third Circuit in *United States ex rel. Forman* v. *McCall (Forman II),* No. 84-5755 (Nov. 14, 1985).

Petitioner relies (Pet. 14-15) on the district court's decision in *Forman* in urging the Court to grant certiorari here. The district court in *Forman* found, after a prior remand by the Third Circuit (709 F.2d 852 (1983) (*Forman I*)), that the Parole Commission's parole guidelines were not flexibly applied, and it therefore held that they constitute "Laws" for purposes of the Ex Post Facto Clause. The court of appeals in *Forman II* has now reversed that holding. The court of appeals explained that it had "carefully reviewed the record developed on remand and conclude[d] that it

unequivocally demonstrates that the guidelines are applied with substantial flexibility." Slip op. 3; see generally *id.* at 10-17. Accordingly, the court of appeals rejected the prisoner's claim of an ex post facto violation. This holding by the Third Circuit removes any basis for petitioner's apparent assertion (Pet. 14-15) that there is a conflict among the courts of appeals on the question whether the Commission's application of more disadvantageous guidelines in effect at the time of the prisoner's parole hearing, rather than those in effect when he committed the offense, violates the Ex Post Facto Clause.

The panel in *Forman II* recognized that its underlying legal premise—that parole guidelines can be considered "Laws" for purposes of ex post facto analysis if they are administered without sufficient flexibility—has been rejected by every other court of appeals that has considered the question, including the Second Circuit in the instant case. See slip op. 5-6 & nn. 3, 4.* But the panel concluded that it was bound by the prior circuit precedent on that question in *Forman I* and *Geraghty* v. *United States Parole Commission,* 579 F.2d 238 (3d Cir. 1978), vacated and remanded on other grounds, 445 U.S. 388 (1980). Slip op. 6. In light of the court of appeals' conclusion that the guidelines are flexibly administered, any divergence of views on that legal issue is of no importance here. Moreover, Judge Higginbotham concurred in the judgment on the ground that the parole guidelines should not be considered "Laws" for purposes of ex post facto analysis, irrespective of the flexibility with which they are administered, and he urged the full court to reconsider that issue en banc. Slip op. 19-20, 30-31. If the full Third Circuit were to pursue Judge Higginbotham's suggestion and overrule *Geraghty* and

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* We have listed the various court of appeals decisions in our brief in opposition (at 5-6) in this case.

Forman I, not only would there be no conflict in the holdings of the various courts of appeals on the ex post facto issue involved in this case; there also would be no disagreement regarding the appropriate analysis of that issue. These recent developments in *Forman II* confirm that the ex post facto issue presented in the instant case does not warrant review by this Court.

For the foregoing reasons and the additional reasons stated in the brief in opposition, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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